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TITLE IX'S THREE-PART TEST: THE (LACK OF) UTILITY OF PRONG 2

ERICA J. ZONDER*

INTRODUCTION

Title IX turned fifty in 2022. The federal law was created to protect people from discrimination based on sex in educational programs or activities that receive federal financial assistance. The law states: "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[1]

As athletic programs at educational institutions have struggled to comply, the Department of Education's Office of Civil Rights (OCR) has periodically issued guidelines in the form of interpretations and clarifications in order to aid in this compliance, and further these guidelines have been used by federal courts as Title IX lawsuits have become more prevalent. One such interpretation, the "Three-Part Test," has been used to measure compliance in terms of gender equity in participation opportunities.

I. THE THREE-PART TEST

In 1979, the OCR (formerly HEW[2]) issued a Title IX policy interpretation regarding intercollegiate athletics. Specifically, the OCR offered an explanation of their approach to participation compliance, detailing a Three-Part Test assessment:

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1. *Title IX and Sex Discrimination*, U.S. DEP'T OF EDUC., OFF. FOR CIV. RTS. (Aug. 2021), https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html.

2. It was called the Department of Health, Education, and Welfare until 1979, when it was spilt into the Department of Health and Human Services, and a separate Department of Education.

> (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
>
> (2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
>
> (3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.[3]

Part one, "substantial proportionality" could be considered a "safe harbor."[4] If the percentage of the underrepresented sex's participation in athletics is within two percent of the overall undergraduate enrollment, the institution is compliant.[5] There is much debate with how exactly to count these numbers (EADA, unduplicated vs. duplicated, etc.), but there is a concreteness to this assessment – schools "know" if they are in compliance.[6] What is less clear/concrete is how to assess compliance for part two and part three, as there are no set numbers or percentages to create a similar safe harbor (and part three required an Additional Clarification in 2005).[7] Part two is examined herein.

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3. *A Policy Interpretation: Title IX and Intercollegiate Athletics*, U.S. DEP'T OF EDUC., OFF. FOR CIV. RTS. (Dec. 11, 1979), https://www2.ed.gov/about/offices/list/ocr/docs/t9interp.html.

4. Norma V. Cantú, Assistant Sec'y for Civ. Rts., *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test*, U.S. DEP'T OF EDUC., OFF. FOR CIV. RTS. (Jan. 16, 1996), https://www2.ed.gov/about/offices/list/ocr/docs/clarific.html.

5. John Wolohan, *Court Opinions Still Vary When Interpreting Title IX*, ATHLETIC BUS. (June 20, 2022), https://www.athleticbusiness.com/operations/legal/article/15292093/court-opinions-still-vary-when-interpreting-title-ix ("many courts have drawn a bright line around 2 percent.").

6. Rachel Axon & Lindsay Schnell, *50 Years After Title IX Passed, Most Top Colleges Deprive Female Athletes of Equal Opportunities*, USA TODAY (Dec. 15, 2022, 4:49 AM), https://www.usatoday.com/in-depth/news/investigations/2022/06/03/title-ix-failures-50-years-colleges-women-lack-representation/9664260002/. Part of the "Title IX: Falling Short at 50" series. Many schools claim to be complying with Prong 1, but research shows that "most appear" to fall short (Western Kentucky University is a specific example, among others). *Id.*

7. Margaret Spellings & James Manning, Sec'y for U.S. Dep't of Educ. & Delegated the Authority of Assistant Sec'y for Civ. Rts., *Additional Clarification of Intercollegiate Athletics Policy: Three-Part Test –*

II. CLARIFICATION OF THE THREE-PART TEST: PART (PRONG) 2

In 1996, a Clarification on the Three-Part Test was issued, confirming that "institutions need to comply only with any one part of the Three-Part Test in order to provide nondiscriminatory participation opportunities for individuals of both sexes."[8] According to the Clarification, "in effect," part two[9] considers both the institution's past and continuing remedial efforts to provide opportunities through program expansion.[10] The OCR will review the entire history of the program's participation opportunities, whether past actions have expanded those opportunities, and also consider developing interests that already exist at the institution.[11] There are "no fixed intervals of time" for adding opportunities, nor is "a particular number of sports dispositive."[12] In fact, Assistant Secretary Cantú's letter specifically details that the Clarification resists "strict numerical formulas or 'cookie cutter' answers to the issues that are inherently case- and fact-specific" which would "deprive institutions of the flexibility . . . when deciding how best to comply."[13] The OCR will consider the following factors for part two compliance, "among others," as evidence:

History of Program Expansion

- an institution's record of adding intercollegiate teams, or upgrading teams to intercollegiate status, for the underrepresented sex;
- an institution's record of increasing the numbers of participants in intercollegiate athletics who are members of the underrepresented sex; and
- an institution's affirmative responses to requests by students or others for addition or elevation of sports.[14]

Part Three, U.S. DEP'T OF EDUC., OFF. FOR CIV. RTS. 3-4 (Mar. 17, 2005), https://www2.ed.gov/about/offices/list/ocr/letters/200503017-additional-clarification-three-part-test.pdf.

8. Cantú, *supra* note 4.

9. Throughout this paper, part two, part 2, prong two, prong 2 will be used interchangeably, as various courts and others use these different terms to refer to part two of the Three-Part Test.

10. Cantú, *supra* note 4.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

Continuing Practice of Program Expansion

- an institution's current implementation of a nondiscriminatory policy or procedure for requesting the addition of sports (including the elevation of club or intramural teams) and the effective communication of the policy or procedure to students; and
- an institution's current implementation of a plan of program expansion that is responsive to developing interests and abilities.[15]

The OCR would also find it to be "persuasive" if the institution conducted periodic nondiscriminatory assessments of developing interests and abilities, followed by "taking timely actions."[16]

The Clarification then addresses the impact of cutting sports on part two compliance. Specifically, the OCR will not find a history and continuing practice of program expansion where the institution reduces opportunities for the overrepresented sex in order to increase "proportional participation opportunities" for the underrepresented sex alone, or by reducing participation opportunities for the overrepresented sex to a proportionately greater degree than the underrepresented sex, as "part two considers an institution's good faith remedial efforts through actual program expansion."[17] And perhaps most importantly, and relevantly for the examination of cases addressed herein,

> [c]uts in the program for the underrepresented sex, even when coupled with cuts in the program for the overrepresented sex, cannot be considered remedial because they burden members of the sex already disadvantaged by the present program. However, an institution that has eliminated some participation opportunities for the underrepresented sex can still meet part two if, overall, it can show a history and continuing practice of program expansion for that sex. In addition, OCR will not find that an institution satisfies part two . . . where it merely promises to expand its program for the underrepresented sex at some time in the future.[18]

15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*

The Clarification offers four examples to illustrate these aforementioned principles, summarized as follows:

Institution C: Compliant with Part Two

- Inception of program in 1970s – seven women's teams established
- 1984 – added women's varsity team "at the request of students and coaches"
- 1990 – upgraded a women's club sport to varsity
- "[C]urrently" implementing plan to add a women's team in 1996 that was identified as an emerging sport (by regional study)
- Addition of all of these teams resulted in increased percentage of women participating in varsity athletics[19]

Institution D: Not Complaint with Part Two – No Continuing Practice

- Established seven teams for women in 1980
- Added women's varsity team in 1983 "based on the requests of students and coaches"
- 1991 – added women's varsity team after an NCAA survey showed increased participation at the high school level
- 1993 – ELIMINATED a viable women's team and a viable men's team in an effort to reduce the athletic budget
- No actions "relating to the underrepresented sex" since 1993 (remember, Clarification came out in 1996) and the only action since 1991 was the aforementioned team elimination[20]

Institution E: Compliant with Part Two (despite elimination of team)

- Mid-70s established five teams for women

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19. *Id.*

20. *Id.* (emphasis added).

- 1979 – added women's varsity team
- 1984 – upgraded a women's club sport with twenty-five participants, at same time eliminated varsity team with eight members
- 1987 and 1989 – added women's varsity teams (doesn't say how many) that were identified "by a significant number of its enrolled and incoming female students" when surveyed
- During this time also increased the size of an existing women's team "to provide opportunities" for women who expressed interest in that sport
- Within past year, added a women's varsity team based on a nationwide survey of the most popular girls high school teams
- Based on all of this, the percentage of women participating in varsity athletics increased, and further, the elimination of the team in 1984 took place within the context of continuing program expansion[21]

Institution F: Complaint with Part Two

- Started women's program in the early 1970s with four teams
- No additions until 1987, when based on requests of students and coaches, it upgraded women's club sport and expanded the size of "several" existing teams (to accommodate "significant" interest by students)
- 1990—surveyed enrolled and incoming female students, and based on results agreed to add three new women's teams by 1997—added a women's team in 1991, 1994, and has plan to add third by 1997
- Program's history since 1987 shows it is committed to program expansion and continuing to expand[22]

All of these examples are illustrative of several principles included in the Clarification, such as no fixed intervals, no set number of teams, and an

21. *Id.*
22. *Id.*

institution "can" still meet part two even if it eliminated some participation opportunities. These examples further illustrate the part two dilemma – there is no specific formula for compliance in either piece – history or continuing practice – leaving these decisions to be decided on a case-by-case basis across jurisdictions when these lawsuits make their way to federal court.

Often these federal Title IX lawsuits occur after the cutting of women's sports and/or participation opportunities. Rarely, however, is part two used as a defense by institutions, as it is not typically successful. The purpose of this paper is to look at three key cases that consider part two – *Cohen v. Brown University*, *Mansourian v. Board of Regents of University of California at Davis*, and *Mayerova v. Eastern Michigan University*, examine the court's decision in each, and further consider the usefulness of part two going forward.

III. *COHEN V. BROWN UNIVERSITY*

Cohen v. Brown University was one of the very first cases that utilized the 1979 Policy Interpretation's Three-Part Test.[23] In 1991, Brown University demoted two women's sports—gymnastics and volleyball—from university-funded status to donor-funded status (in effect, from varsity to club), along with two men's sports. A class action lawsuit followed. The district court granted a preliminary injunction ordering that the two women's teams be reinstated to university-funded status, and further prohibited Brown from eliminating or reducing the status of any existing varsity team until the case was resolved on the merits.[24] This decision was upheld by the First Circuit,[25] and resolved on the merits in 1995.[26] The First Circuit ultimately upheld the finding that Brown violated Title IX (the relief/remedial efforts were remanded,[27] and ultimately a Joint Agreement was entered in 1998, with a 2020 settlement agreeing to end the Agreement in 2024).[28]

23. Brian L. Porto, Annotation, *Suits by Female College Athletes Against Colleges and Universities Claiming that Decisions to Discontinue Particular Sports or to Deny Varsity Status to Particular Sports Deprive Plaintiffs of Equal Educational Opportunities Required by Title IX (20 U.S.C.A. §§ 1681-1688)*, 129 A.L.R. Fed. 571 (1996). "[T]he trial court in *Favia*, like the other courts whose decision appear in this section [(*Roberts and Cohen)*] applied a three-part test that appears in a 'Policy Interpretation" of Title IX adopted . . . in 1979." *Id.* at 571 n.15.

24. Cohen v. Brown Univ., 809 F. Supp. 978, 1001 (D.R.I. 1992).

25. Cohen v. Brown Univ., 991 F.2d 888, 907 (1st Cir. 1993).

26. Cohen v. Brown Univ., 879 F. Supp. 185, 214 (D.R.I. 1995).

27. Cohen v. Brown Univ., 101 F.3d 155, 188 (1st Cir. 1996).

28. *Joint Statement Issued by the Parties in Cohen v. Brown University*, PUB. JUST., https://www.publicjustice.net/wp-content/uploads/2020/09/Joint-Statement-FINAL.pdf (last visited Dec. 30, 2022). Which was

A. Lack of "Continuing Practice"

In *Cohen I*, the court found that Brown having failed the requirements of part one substantial proportionality, required a look into the "escape" routes under part two (and three).[29] According to the court, Brown didn't have a *continuing* practice of program expansion.[30] While there was "impressive growth" in the 1970s, the participation numbers were "fairly constant at 61% men and 39% female," but according to an internal study prepared by the university, in 1978-79, those numbers dipped to – 63.9% men and 36.1% women.[31] And, the only sport added since 1977 was "winter" (indoor) track in 1982, a "sport that merely involved providing indoor space to the existing women's track team."[32] Brown argued that "expansion" goes beyond numbers, and pointed to improved and added coaching for women's teams, an increase in the level of competition, and other evidence of "growth" in the women's athletic program.[33] The court rejected this as the policy interpretation "directly links" the program expansion step to the number of teams and participants, and further stated that a court must address past actions and future plans to add or eliminate sports in consideration of interests and abilities of the underrepresented sex.[34]

The First Circuit in *Cohen II* agreed and while "not entirely unsympathetic" to Brown's impressive growth in the 1970s, nevertheless upheld the district court's determination that Brown had not "met the benchmark" as "not unreasonable."[35] According to the court,

> [w]hile a university deserves appreciable applause for supercharging a low-voltage athletic program in one burst rather than powering it up over a longer period, such an energization, once undertaken, does not forever hold the institution harmless. Here, Brown labored for six years to

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then appealed by "objectors" from the class and subsequently upheld. Cohen v. Brown Univ., 16 F.4th 935, 953 (1st Cir. 2021). *See also* Kashif Ansari, *Court Upholds Title IX Settlement Appeal as 'Compromise' Between Both Parties*, BROWN DAILY HERALD (Nov. 1, 2021, 10:05 PM), https://www.browndailyherald.com/article/2021/11/court-upholds-title-ix-settlement-appeal-as-compromise-between-both-parties.

29. *Cohen*, 809 F. Supp. at 991.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. Cohen v. Brown Univ., 991 F.2d 888, 903 (1st Cir. 1993).

> weave a broad array of new activities into the fabric of its palestrian offerings. The district court apparently believed, however, that Brown then rested on its laurels for at least twice that long. The very length of this hiatus suggests something far short of a *continuing* practice of program expansion.[36]

And finally, in *Cohen III*, the district court reiterated its findings at the preliminary injunction stage, noting that although Brown "has an impressive *history* of program expansion, they have failed to demonstrate a *continuing practice* of intercollegiate program expansion for women, the underrepresented sex."[37] It should be noted here that this assessment considered Brown's addition of a women's skiing program in 1994. The court further stated that "merely reducing program offerings to the overrepresented sex does not constitute program expansion . . . the fact that Brown has eliminated or demoted several men's teams does not amount to a continuing practice of program expansion for women."[38]

IV. *MANSOURIAN V. BOARD OF REGENTS OF UNIVERSITY OF CALIFORNIA AT DAVIS*

In *Mansourian v. Board of Regents of University of California,* female wrestlers brought a Title IX lawsuit after being excluded from men's intercollegiate wrestling.[39] Plaintiffs were three female wrestlers who participated on the "acclaimed" men's wrestling team at the University of California, Davis (UCD). In the 2000-2001 academic year, UCD eliminated all women from the team. After the students filed a complaint with the OCR, UCD allowed them to again participate, but only if they could "beat" male wrestlers in their weight class, using men's collegiate wrestling rules (the women had previously wrestled only other women, and used international freestyle rules).[40] As a result, the women were unable to compete. Upon appeal of summary judgment to the Ninth Circuit, the circuit court analyzed part two under the Clarification, requiring "two separate inquiries" in terms of

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36. *Id.*

37. Cohen v. Brown Univ., 879 F. Supp. 185, 211 (1995), *aff'd in part*, *rev'd in part*, 101 F.3d 155 (1st Cir. 1996).

38. *Id.*

39. Mansourian v. Regents of Univ. of Cal., 602 F.3d 957, 962 (9th Cir. 2010).

40. *Id.*

"history" and "continuing practice."[41] In terms of history, the circuit court found that UCD expanded opportunities only between 1996 and 2000, and then began an overall contraction of female opportunities beginning in 2000, and further used roster management to reduce men's participation opportunities, running afoul of the Clarification's good faith remedial effort language.[42] And in terms of continuing practice – UCD rejected four club teams applications for varsity status, instead choosing to add women's golf – proposed by the men's golf coach absent any demonstrated interest.[43] And while universities are free to consider applications from individuals other than students, UCD failed to establish that adding golf was responsive to the interests of current or prospective students. And, even if golf was growing in popularity, there is no evidence that it was more popular or emerging than the other four sports, and further, golf offered the least number of roster spots among them. Lastly, according to the circuit court, "Option Two requires more than a single step," so while the adding of three teams in 1996 was significant, it requires "continuous" progress.[44] The case was reversed and remanded back to the district court for a bench trial.[45]

The district court examined UCD's history of gender equity from 1970, stating that at all times, females were the underrepresented sex.[46] Even before the passage of Title IX, UCD had a philosophy called "The Davis View" to offer intercollegiate athletics to the greatest number of students possible, and further, after a 1989 internal Title IX compliance review that found they were not complying with any part of the Three-Part Test, UCD "preferred trying to add women's teams rather than eliminate men's teams in attempting to comply with Title IX"—in accordance with this philosophy.[47] The court notes that women's cross country was elevated to varsity status in 1978 (in response to requests made from coaches), water polo, lacrosse, and crew were elevated to varsity status in 1996 (per club teams applications)—the only two times the administration solicited applications but otherwise had no other formal system for assessing interests.[48] Indoor Track & Field was added as an official

41. *Id.* at 969.
42. *Id.* at 970-71.
43. Mansourian v. Regents of Univ. of Cal., 602 F.3d 957, 972 (9th Cir. 2010).
44. *Id.* at 973.
45. *Id.* at 974.
46. Mansourian v. Bd. of Regents of Univ. of Cal., 816 F. Supp. 2d 869, 875 (E.D. Cal. 2011).
47. *Id.* at 877.
48. *Id.* at 881-82.

separate sport in 1998-1999.[49] The process for adding another sport was begun again in 2002, with applications solicited in 2003 and women's golf being added in 2005.[50] The district court, contrary to the opinion of the circuit court, found that UCD's addition of golf was responsive to developing interests and abilities of female athletes.[51] The "relevant circumstances" considered by the court included: the application was submitted by an athletic employee (Associate Athletic Director here), per the same rules used in the 1995 process; adding women's golf had been discussed numerous times before the 2002 process began; the President of the California chapter of National Organization for Women (Cal NOW) had suggested it; there was high participation in high schools and junior colleges; UCD was getting inquiries from prospective students; golf was already played in UCD's conference; 451 colleges had intercollegiate programs; NCAA championships were offered in all three divisions; and a local course was available.[52]

The court also considered testimony from experts on both sides – Defendants used Dr. Christine Grant. She had testified in *Cohen III*, had been an athletic director for twenty-seven years at the University of Iowa, and had contributed to the OCR's development of both the 1979 and 1996 guidelines. Plaintiffs used Dr. Donna Lopiano, also widely considered an expert who had participated in *Cohen III*, and was an athletic director at the University of Texas for over eighteen years, and was also active with the development of OCR regulations. Both experts agreed that under part two, the school must have both a history and continuing practice; the number of participation opportunities is determinative of expansion, not teams; roster management of men's teams is not program expansion for female students; and if a school eliminates participation opportunities for female students, it must replace those opportunities and continue to expand.[53] What they did not agree on, however, was how to measure UCD's actions. According to Dr. Lopiano, UCD did not adequately expand participation opportunities because it didn't add a women's team for nine years,[54] while Dr. Grant testified that an institution should expand every two to three years to rely on "prong two," but UCD should be given a nine year "credit" for the three teams added in 1996, as though UCD

49. *Id.* at 883.

50. *Id.* at 883-84.

51. *Id.* at 884.

52. Mansourian v. Bd. of Regents of Univ. of Cal., 816 F. Supp. 2d 869, 883-84 (E.D. Cal. 2011).

53. *Id.* at 888.

54. *Id.*

had added one every two to three years.[55] Dr. Grant further stated that UCD's declines in participation were part of "normal" fluctuation, but neither expert testified as to how to measure or determine "normal."[56]

A. Conclusions of Law in Mansourian

1. History of Program Expansion

The district court looked at the "entirety" of the circumstances. It found that UCD did have a history of program expansion – while there was stagnation between 1978 and 1995, the adding of the three sports in 1995 (started playing in 1996) and elevating indoor track in 1998 constituted aggressive remedial efforts in the shorter more current period (plaintiff entered school in 1998).[57] The court contrasted this with *Cohen I*, where there was impressive growth in the 1970s but no additional opportunities added in the subsequent two decades.[58]

2. Continuing Practice

The district court found UCD eliminated more than sixty participation opportunities for women between 1998-1999 and 2004-2005, and "[s]uch evidence demonstrates overall program contraction . . . not expansion."[59] Participation rates rose again in 2005-2006, but were still twenty-five less than 1998-1999.[60] Curiously, however, the court specifically noted that thirty lost participation opportunities were due to the elimination of "B" teams for women's water polo and women's lacrosse.[61] And that while the legitimate, nondiscriminatory reasons for eliminating these teams was not a Title IX violation, the "*failure to replace these opportunities*" prevents UCD from achieving prong two compliance.[62] Nor did the court consider this to be "normal fluctuation."[63] The court contrasted UCD with the examples in the Clarification, specifically Institution C due to the elimination of the varsity

55. *Id.* at 889.
56. *Id.*
57. *Id.* at 924.
58. Mansourian v. Bd. of Regents of Univ. of Cal., 816 F. Supp. 2d 869, 924 (E.D. Cal. 2011).
59. *Id.* at 923.
60. *Id.* at 924.
61. *Id.*
62. *Id.*
63. *Id.* at 925.

"B" teams, and Institution E for not replacing those opportunities.[64] Ultimately, the "gravamen of [p]rong [t]wo compliance is an ever-increasing number of actual participation opportunities for the underrepresented sex."[65]

The district court noted that the elimination of the women's participation opportunities on the wrestling team is "irrelevant" to this conclusion and is "akin to normal, legitimate fluctuations"[66] and further used an example of a hypothetical sole female participant on the men's football team – once she graduates, the participation opportunity would be eliminated, but that isn't the same as the elimination of an entire women's varsity sport, and to equate the two runs "counter to the purposes of Title IX."[67]

V. *MAYEROVA V. EASTERN MICHIGAN UNIVERSITY*

In 2018, Eastern Michigan University (EMU) announced it was cutting four athletic programs – women's tennis, women's softball, men's wrestling, and men's swimming and diving.[68] Two female athletes, tennis player Marie Mayerova and softball player Ariana Chretien, soon brought suit in federal court, alleging violations of both Title IX and the Equal Protection Clause, and further they sought a temporary restraining order/preliminary injunction. When deciding on the likelihood of success on the merits of the Title IX claim for purposes of the injunction, the court assessed EMU's compliance with Title IX's Three-Part Test, specifically part two as EMU did not claim to provide substantially proportionate opportunities to satisfy part one, nor did the school argue that it satisfied part three as members of the eliminated teams represented interests and abilities that were not being accommodated by the present program.[69]

A. History of Program Expansion

Regarding a history of program expansion, EMU claimed an "overall trend" of growth in female participation.[70] The district court considered EMU's roster management plan for 2015-2020, which targeted a reduction in the rosters of men's sports by seventy-five athletes, and increased the rosters

64. Mansourian v. Bd. of Regents of Univ. of Cal., 816 F. Supp. 2d 869, 926 (E.D. Cal. 2011).

65. *Id.* at 926.

66. *Id.* at 925-26.

67. *Id.*

68. Mayerova v. E. Mich. Univ., 346 F. Supp. 3d 983, 986 (E.D. Mich. 2018).

69. *Id.* at 992-96.

70. *Id*. at 993.

for women's sports by forty, all by 2020.[71] The court noted that as part of this roster management plan, an expansion in both softball and tennis participation were called for.[72] According to the court, EMU did not provide information demonstrating that these goals were met (hard to imagine regardless, per the cutting of the two women's sports that were to be expanded), therefore the plan was not a useful tool for the court in making a determination.[73] The court then reviewed the actual numbers of female athletes from 2003-2016, which showed an increase of 52 from 2003 to 2004, and then a drop for several years in a row, resulting in 195 by 2008.[74] Participation increased again – 222 in 2009 to 316 in 2012.[75] According to the court, the increases for females had been accompanied by an increase for males as well, with the highest percentage being 48.62 percent in 2003, and "hover[ing] in the 40-44 percent range" thereafter (the percentage of overall female undergraduates ranged from 56 to 60 percent during this time) and showing no significant improvement from 2009-2016.[76] The court also found that EMU's provided information regarding participation numbers also "do not provide clear support" that EMU had a "history of expanding athletics opportunities for women" – as most sports experienced minor fluctuation from 2002-2016, swimming and diving had a brief increase in 2015 that did not last into 2016, rowing and track had seen "significant fluctuations" in size – both increases and decreases (track is on a upward trend since 2010).[77] And lastly, the court found that EMU did not articulate how any expansion is responsive to developing abilities of the underrepresented sex, for example increasing track rosters, and further had not conducted a survey to gauge interest in athletics "for the past few years."[78] EMU also did not add or upgrade teams, nor did the school provide evidence as to whether such opportunities have been requested by students.[79]

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71. *Id.*
72. *Id.*
73. *Id.* at 993.
74. Mayerova v. E. Mich. Univ., 346 F. Supp. 3d 983, 994 (E.D. Mich. 2018).
75. *Id.*
76. *Id.*
77. *Id.* 994-95.
78. *Id.* at 995.
79. *Id.*

B. Continuing Practice

For a continuing practice of program expansion, the district court considered "(1) EMU's current implementation and effective communication of a nondiscriminatory policy for requesting new sports, and (2) EMU's current implementation of a plan of program expansion that is responsive to developing interests and abilities."[80] For (1), EMU made no showing regarding a policy.[81] For (2), EMU relied on a new expanded 2018 roster management plan which would have increased the female participation rate percentage (including potentially adding women's lacrosse).[82] The court found that EMU was lacking actual numbers for the "upcoming" season and had not explained how this roster management plan was responsive to the developing interests and abilities.[83] According to the court, without additional information, it cannot assess whether EMU's estimates "reflect a meaningful expansion of the program, particularly when EMU's actual numbers do not reflect a history of expansion."[84] These were "mere promises to expand" sometime in the future and therefore insufficient to satisfy part two.[85] The court also noted that EMU's plan to manipulate the rosters to balance the female participation rate would not be considered good faith remedial efforts through actual program expansion[86] and regardless, EMU's elimination of teams was not taken with the intent of compliance with Part One, but "admittedly for financial reasons."[87] The preliminary injunction was granted, EMU appealed to the Sixth Circuit, and the injunction was stayed in regard to the order to reinstate softball (and ultimately women's lacrosse was added instead), as Title IX does not require "that certain teams . . . be reinstated rather than other sports teams be created, supported, or expanded."[88]

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80. Mayerova v. E. Mich. Univ., 346 F. Supp. 3d 983, 995 (E.D. Mich. 2018).

81. *Id.*

82. *Id.*

83. *Id.* at 995-96.

84. *Id.*

85. *Id.* at 996.

86. *See* Roberts v. Colo. State Bd. of Agric., 998 F.2d 824 (10th Cir. 1993); Cohen v. Brown Univ., 809 F. Supp. 978 (D.R.I. 1992).

87. Mayerova v. E. Mich. Univ., 346 F. Supp. 3d 983, 996 (E.D. Mich. 2018); *see Cohen*, 809 F. Supp. 978 (D.R.I. 1992); *see also Roberts*, 998 F.2d 824 (10th Cir. 1993).

88. Mayerova v. E. Mich. Univ., No. 19-1177, 2019 U.S. App. LEXIS 9373 (6th Cir. Mar. 28, 2019).

VI. OTHER RELEVANT CASES

In another key pre-Clarification case, in 1993, the Tenth Circuit in *Roberts* agreed with the district court that adding eleven women's sports in the 1970s, followed by a long period of declining participation opportunities in the 1980s, Colorado State University (CSU) could not demonstrate a maintained practice of program expansion.[89] Noted was the thirty-four percent decline in women's participation numbers, due to "budget cuts," was greater than the men's decline (twenty percent) and that CSU dropped three women's sports.[90] The circuit court recognized that in difficult economic times, few schools will be able to satisfy prong 2 by continuing to expand their women's programs, but "[n]onetheless, the ordinary meaning of the word 'expansion' may not be twisted to find compliance under this prong when schools have increased the relative percentages of women participating in athletics by making cuts in both men's and women's sports programs."[91] The court further said even with cuts to both men's and women's programs, an institution may still comply with Title IX, but only to achieve prong 1 substantial proportionality.[92] Also in 1993, the court in *Favia v. Indiana University of Pennsylvania* (IUP) ruled that the school did not comply with any part of the test.[93] For prong 2 specifically, "some" expansion pre-1991 does not survive the regression post-1991 cuts – the "levels of opportunities for women to compete went from low to lower,"[94] and further, "you can't replace programs with promises."[95] Also informative here, the court was "sympathetic" that football was a major reason for the dominance of men's teams over women's teams at IUP, but "a cash crunch is no excuse," nor allows for an exception to Title IX compliance.[96]

In *Ollier v. Sweetwater Union High School District* (2014), the Ninth Circuit affirmed a district court ruling that Castle Park High School failed all three prongs of the Three-Part Test.[97] For prong 2 specifically, the court found the Clarification's guidance regarding no fixed intervals nor number of sports to be "helpful"[98] as Sweetwater claimed increases in the number of teams in

89. Roberts v. Colo. State Bd. of Agric., 998 F.2d 824, 830 (10th Cir. 1993).

90. *Id.*

91. *Id.*

92. *Id.*

93. Favia v. Ind. Univ. of Pa., 812 F. Supp. 578, 584-85 (W.D. Pa. 1993).

94. *Id.* at 585.

95. *Id.*

96. *Id.* at 583.

97. Ollier v. Sweetwater Union High Sch. Dist., 768 F.3d 843, 870-71 (9th Cir. 2014).

98. *Id.* at 857.

the last decade showed prong 2 compliance while the court focused on the number of athletes, which had "dramatic ups and downs" and looked "nothing like the upward trend line that Title IX requires."[99] The court concluded that the situation was "far from the kind of steady march forward" needed to show a history and continuing practice of program expansion for women's sports.[100] In *Robb v. Lock Haven University* (2019), the court found that Lock Haven similarly did not satisfy any part of the Three-Part Test (at present time, for purposes of summary judgment, although prong three could potentially be shown at trial).[101] For prong 2 specifically, the court called female participation opportunities a "rollercoaster" pattern in terms of both raw numbers and teams added (net zero here).[102] The court stated that Lock Haven does not have a "history . . . of program expansion," leaving it unclear if there was a distinction between the two parts of prong 2 compliance.[103] In *Portz v. St. Cloud State University* (2019), the court found that the school did not add an intercollegiate women's team to its sport program for nearly two decades, there was no consistent pattern or record of increasing participation numbers for women, and "all" requests to add women's sports were denied, due to financial reasons – not a lack of interest or ability.[104] All of this, along with the elimination of women's gymnastics, led to the court finding a lack of prong two compliance – specifically a failure in the school's "continuing obligation to expand opportunities."[105]

VII. TAKEAWAYS AND ISSUES WITH PART TWO/PRONG 2 COMPLIANCE: IS IT TIME TO MOVE ON?

The second piece of prong 2, a continuing practice of program expansion, seems to be the key consideration in all of the aforementioned cases. In *Cohen I*, a robust early history of adding women's sports was followed by a lengthy hiatus. In *Mansourian*, aggressive efforts to add sports during the relevant time period were followed by a loss of participation opportunities, including a failure to replace opportunities after the cutting of "B" teams. In *Mayerova*,

99. *Id.*

100. *Id.* at 857-58.

101. Robb v. Lock Haven Univ., No. 4:17-CV-00964, 2019 WL 2005636, at *13 (M.D. Pa. May 7, 2019).

102. *Id.* at *9.

103. *Id.*

104. Portz v. St. Cloud State Univ., 401 F. Supp. 3d 834, 860 (D. Minn. 2019), *aff'd*, 16 F.4th 577 (8th Cir. 2021).

105. *Id.*

roster management was not considered a good faith remedial effort and the sports were cut due to financial reasons, not lack of interest. And further, promises to expand are not enough when there is no evidence of past expansion. *Roberts* and *Favia* confirm that cutting women's sports is clearly not a continuing practice of expansion. In the more recent cases, the dramatic ups and downs in *Ollier*, the rollercoaster in *Robb*, and the lack of adding teams, plus eliminating one in *Portz*, all support the idea that the schools are not continuing to add participation opportunities for women.

These cases raise several issues about barriers to the usefulness on prong 2 as a method of measuring Title IX participation compliance going forward:

A. Lack of rubric, formula, or consistent standards. Even the four examples in the 1996 Clarification fail to demonstrate any set pattern. The Clarification specifically states that there are no specific intervals or specific number of teams required to show compliance, but one could argue that the opposite would prove more useful. What if schools were required to add a team or a set number of participation opportunities for the underrepresented sex every five years (or two to three, per the testimony of experts in *Mansourian*) until substantial proportionality was met, for example? And as long as they met the benchmarks, they would be considered in good standing. The opposite side of this argument concerns whether requiring certain numbers or benchmarks could be considered a quota system, which are frowned upon when associated with remedying discriminatory practices.[106]

B. Judicial inconsistency. As long as this prong is being decided on a case-by-case basis, there will always be elements left open to interpretation that lead to a lack of uniformity in

106. The court addressed this argument in Cohen v. Brown Univ., 101 F.3d 155, 170 (1st Cir. 1996).

> Title IX is not an affirmative action statute; it is an anti-discrimination statute, modeled explicitly after another anti-discrimination statute, Title VI. No aspect of the Title IX regime at issue in this case — inclusive of the statute, the relevant regulation, and the pertinent agency documents — mandates gender-based preferences or quotas, or specific timetables for implementing numerical goals.

Id. And further, "like other anti-discrimination statutory schemes, the Title IX regime *permits* affirmative action." *Id. See also* in his dissent, Chief Judge Torruella, stated: "I believe that the three prong test, as the district court interprets it, is a quota." He further agreed with the majority that Title IX is not an affirmative action statue but that the district court made it one, "[a]s interpreted by the district court, the test constitutes an affirmative action, quota-based scheme." *Id.* (Torruella, C.J., dissenting).

results. And further, not all courts have the same background and experience – even the experts testifying in *Mansourian* could not agree on how to measure the school's actions. And, while the standards for prong 2 have not been changed, per se, since the 1996 Clarification, certainly each new presidential administration brings its own attitudes towards enforcement.

C. Budget. It is expensive to add sports – it requires interest yes, but also infrastructure, scholarships, and other expenditures. Yes, some (many?) schools spend disproportionately on football and/or men's basketball, but one cannot ignore rising competitive costs, demographic and enrollment fluctuations, and even COVID, as barriers to expansion. Is it asking too much for schools to regularly or consistently increase spending, especially on non-revenue sports?

D. Self-fulfilling prophecy. Of course, institutions are failing prong 2, one must ask: if they had a history AND continuing practice of adding opportunities for the underrepresented sex, would we be seeing Title IX lawsuits on this issue? Wouldn't substantial proportionality have been reached by now? And further, Title IX is now fifty years old – many schools added a lot of women's sports early on, many at the same time, leaving less room for additions but still a lot of time for additions, potentially exacerbating the lag when assessing what "continuing" really requires. Can a continuing practice really be shown at this point? A 2022 survey by USA Today asked the 127 Football Bowl Subdivision (FBS) schools which of the three prongs they "claimed" compliance with, and of the 42 who responded, just 7 cited prong 2, and further, evidence demonstrated that at least two of those schools did not meet requirements – the two schools had not added sports in several years (one claimed that COVID derailed plans), and a third coincidently announced a new team to start competition in 2024-2025.[107]

These issues and barriers, combined with the aforementioned court decisions, demonstrate the non-usefulness, or perhaps more strongly, the impossibility, of complying with part two of Title IX's Three-Part Test.

107. *See* Axon & Schnell, *supra* note 6.

Perhaps the time has come for a change, whether eliminating part two – potentially saving resources such as time and money wasted in protracted court battles (not to mention OCR investigations[108]) or modifying it (see A above for one idea). And then, either change could, and should, result in the expansion of opportunities for the underrepresented sex as forcing schools to comply with part one or part three will often lead to adding teams and/or participation opportunities, as could a modified approach to part two. Regardless, "forcing" schools to comply, absent court intervention, is a difficult proposition. Title IX athletic compliance, fifty years in, is still a work in progress.

108. As of July 1, 2022, there were 107 "[a]thletics"-related cases under investigation by the OCR, presumably some are related to the Three-Part Test. *Pending Cases Currently Under Investigation at Elementary-Secondary and Post-Secondary Schools*, U.S. DEP'T OF EDUC., OFF. FOR CIV. RTS., https://www2.ed.gov/about/offices/list/ocr/docs/investigations/open-investigations/tix.html?sorts%5Bdate%5D=1&page=86&offset=1700 (last visited Dec. 30, 2022). *See also* Henry Bushnell, *After 50 years, Title IX Compliance in College Sports Still Lags. The Reason? 'It has No Teeth'*, YAHOO! SPORTS (June 23, 2022), https://sports.yahoo.com/title-ix-compliance-college-sports-enforcement-department-of-education-office-for-civil-rights-161545634.html (claiming eleven current Division 1 school cases pending, and at "at least" twenty-five resolved cases (resolution agreement) at Division 1 schools since 2010).